Supreme Court, U.S.
FILED

No. 051353 APR 24 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT BENSON and
JUDITH BENSON,

Petitioners,

v.

STATE OF SOUTH DAKOTA; M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish and Parks,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

PETITION FOR WRIT OF CERTIORARI

JOSEPH F. BECKER*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioners

CUSTOM LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), this Court held that "the right to exclude is one of the most essential sticks in the bundle of rights that are commonly characterized as property" and "where a governmental action results in a permanent physical occupation of the property, by the government itself or by others, the Court's cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit." This petition presents the following questions:

1. Whether a state action that makes "lawful" and subsequently results in shooting across and onto private property from public rights-of-way constitutes a taking under the Fifth Amendment to the United States Constitution?

2. Whether a taking occurs under the Fifth Amendment between such time as a State makes "lawful" the act of shooting across and onto private property from public rights-of-way and such later time as that State adopts a *post hoc* "mere decriminalization" defense to a takings claim?

3. Whether an after-the-fact civil remedy is adequate to preclude a Fifth Amendment takings claim when State action results in repeated physical invasions of private property by potentially fatal projectiles?

LIST OF PARTIES

Robert Benson and Judith Benson are residents of the State of South Dakota and landowners therein. They were Plaintiffs before the Circuit Court of the Sixth Judicial District, Tripp County, South Dakota and Appellees before the Supreme Court of South Dakota. The other two parties to the case below, Jeff Messmer and Tricia Messmer, are not parties to this petition.

The State of South Dakota; M. Michael Rounds, in his official capacity as Governor of the State of South Dakota; Larry Long, in his official capacity as Attorney General of the State of South Dakota; South Dakota Department of Game, Fish and Parks; and John Cooper, in his official capacity as Secretary of the South Dakota Department of Game, Fish and Parks, were Defendants before the Circuit Court of the Sixth Judicial District and Appellants before the Supreme Court of South Dakota.

STATEMENT OF RELATED CASES

There are no related cases.

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	i
LIST OF PARTIES	ii
STATEMENT OF RELATED CASES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
ARGUMENT	7
I. THE SOUTH DAKOTA SUPREME COURT DEFIED THIS COURT'S PRECEDENTS WHEN IT HELD THAT STATE ACTION RESULTING IN PHYSICAL OCCUPATION OF PRIVATE PROPERTY DOES NOT CONSTITUTE A *PER SE* TAKING	7
A. Section 41-9-1.1(2) Is A Categorical Taking Because It Results In A Permanent Physical Invasion That Interferes With A Landowner's Right To Exclude	9
1. A physical invasion is a taking *per se*	9
2. The firing of guns over and onto private property is a physical invasion	11

TABLE OF CONTENTS – Continued

Page

II. AT A MINIMUM, A *PER SE* TAKING OCCURRED FROM THE TIME THAT SOUTH DAKOTA OFFICIALLY DECLARED SHOOTING ONTO PRIVATE PROPERTY LAWFUL AND SUCH TIME AS THE SUPREME COURT EMBRACED THE STATE'S *POST HOC* "DECRIMINALIZATION" DEFENSE 15

A. The Hunting Public Was Placed Repeatedly On Notice That Shooting Onto And Across Private Property Was Fully Lawful 17

1. The Legislature intended to and did, in fact, fully legalize shooting onto private property and, in so doing, provided notice to the hunting public of such lawfulness 17

2. The South Dakota Department of Game, Fish and Parks provided further notice to the public that shooting onto private property is "lawful" 19

3. The South Dakota Attorney General's Office provided further notice to the hunting public that shooting onto private property "is allowed" 20

4. The South Dakota Supreme Court itself provided notice that shooting onto private property was lawful 21

B. Attempts To Pursue A Civil Remedy In Trespass Prior To The South Dakota Supreme Court's Adoption Of The "Decriminalization" Defense Would Have Resulted In Criminal Sanctions Against The Bensons 22

TABLE OF CONTENTS – Continued

Page

C. South Dakota's Notice Of Lawfulness Combined With The Resulting Physical Invasions Is A *Per Se* Taking Of The Bensons' Property 22

III. AN AFTER-THE-FACT CIVIL REMEDY IS NOT A CONSTITUTIONALLY VIABLE SUBSTITUTE FOR THE RIGHT TO EXCLUDE AND THIS CASE WARRANTS REVIEW TO PREVENT THE "DECRIMINALIZATION" DEFENSE FROM ERODING THAT ESSENTIAL RIGHT 24

CONCLUSION 28

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Armstrong v. United States, 364 U.S. 40 (1960) 26

Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824 (9th Cir. 2004) 16

Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765) 27

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 16, 23

Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936) 12

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 16

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ..... *passim*

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 9, 10

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 6, 10, 25

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 9, 14

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) 11

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 15

U.S. v. Causby, 328 U.S. 256 (1946) 6, 11, 12

TABLE OF AUTHORITIES – Continued

Page

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 26

Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973) 12

STATE CASES

Alcorn v. Edmonds County, 241 N.W.2d 323 (S.D. 1932) 24

Benson v. State, 710 N.W.2d 131 (S.D. 2006).... 1, 14, 15, 26

Butler v. Frontier Telephone Co., 79 N.E. 716 (N.Y. Ct. App. 1906) 12

Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc., 624 N.W.2d 796 (Minn. App. 2001)..... 11, 12

Delta Air Corp. v. Kersey, 20 S.E.2d 245 (Ga. 1942)..... 12

Digirolamo v. Philadelphia Gun Club, 89 A.2d 357 (Penn. 1952)..... 12

Nolan and Nolan v. City of Eagan, 673 N.W.2d 487 (Minn. App. 2003) 24

Reis v. Miller, 550 N.W.2d 78 (S.D. 1996)..... 22

SDDS, Inc. v. State, 650 N.W.2d 1 (S.D. 2002)..... 10

State v. Rumpca, 652 N.W.2d 795 (S.D. 2002).... 7, 18, 21, 22

State v. Tracy, 539 N.W.2d 327 (S.D. 1995) 22

State v. Wilkinson, 724 So.2d 614 (Fla. Dist. Ct. App. 1998)..... 11

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

S.D. Const. art. VI, § 1 27

S.D. Const. art. VI, § 13 24

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV 2, 9

FEDERAL STATUTES

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 ..... 3, 5

SOUTH DAKOTA CODIFIED LAWS

§ 15-26A-38 ..... 1, 5

§ 22-18-4 23

§ 41-1-8 ..... 22, 23

§ 41-9-1 13

§ 41-9-1.1 14

§ 41-9-1.1(2) ..... *passim*

§ 43-2-1 24

§ 50-13-3 11

OTHER AUTHORITIES

The Declaration of Independence, ¶ 2 (U.S. 1776) 27

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 10

TABLE OF AUTHORITIES – Continued

Page

Ralph Ketcham, *James Madison: A Biography* (Univ. of Virginia Press 1990) 26

Vincent Michael Roche, *Road Hunting Shot Down: Reflecting on the South Dakota Supreme Court's Decision in State v. Rumpca*, 7 Great Plains Nat. Resources J. 31 (2003) 7

PETITION FOR WRIT OF CERTIORARI

Petitioners Robert and Judith Benson respectfully petition this Court for a *writ* of *certiorari* to review the judgment of the South Dakota Supreme Court.

OPINIONS BELOW

Review is sought of the opinion of the South Dakota Supreme Court, filed on January 24, 2006, denying Petitioners relief under the Fifth Amendment to the United States Constitution. *Benson v. State of South Dakota*, 710 N.W.2d 131 (S.D. 2006). App. 1-68. The South Dakota Supreme Court's decision affirmed in part and reversed in part the decision of the trial court, the Circuit Court of the Sixth Judicial District, Tripp County, South Dakota. The trial court's order granting Petitioners' motion for summary judgment and injunctive relief was issued on December 27, 2004. App. 71-74. Under S.D. Codified Laws § 15-26A-38, however, Respondents enjoyed an "automatic" stay beginning one day later on December 28, 2004, and lasting through January 24, 2006. App. 105, 69.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).